# The Evolution from Strict Liability to Negligence: Implications for the Tort of Private Nuisance – Part 2

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*Part 1 of this article considered the broad shift in the law of tort away from a strict liability, "act at peril" approach in favour of a fault-based system of liability, best shown in the explosive growth of the tort of negligence. Given the overwhelming prevalence of fault-based liability in negligence, it causes us to wonder about continuing pockets of strict liability elsewhere in tort law. The tort of private nuisance is typically seen as one such tort. Part 2 considers these trends and developments, with a view to considering whether the tort of private nuisance might now be subsumed into the law of negligence, as has occurred with other torts that formerly had a separate identity.*

## INTRODUCTION

In Part 1 of this article, *The Evolution from Strict Liability to Negligence: When and Why*, I considered the historical shift in the law of civil obligations away from notions of strict liability and towards the fault-based system we now regard as axiomatic. This took some time to play out, and was influenced by a range of factors. Much went on preceding the landmark decision in 1932 in *Donoghue v Stevenson*[1] by way of background. Still in the law of civil obligations, pockets of strict liability persist. I also considered the arguments sometimes made to support the imposition of strict liability. It was concluded that arguments for the retention of strict liability in the law of tort were weak.

What, if any implications, does the discussion above have for the tort of private nuisance? It has already been noted both that this tort is traditionally seen as one of strict liability, but that it is possible that juries deciding cases actually did take into account the fault or otherwise of the defendant in determining cases.

Now, as has been observed, the High Court absorbed the *Rylands*[2] action into the tort of negligence, partly on the basis that there were few, if any, cases decided on *Rylands* grounds that would not be decided the same way on negligence principles.[3] At around the same time, the House of Lords announced that it viewed the *Rylands* decision as an instance of private nuisance.[4] The merit or otherwise of combining these ideas is now considered. In other words, should the tort of private nuisance be absorbed into the law of negligence?[5] The tort of public nuisance, at least in the context of highway liability (a

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[1] *Donoghue v Stevenson* [1932] AC 562.

[2] *Rylands v Fletcher* (1866) LR 1 Ex 265.

[3] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

[4] *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264. For critique see John Murphy, "The Merits of Rylands v Fletcher" (2004) 24(4) *Oxford Journal of Legal Studies* 643; Donal Nolan, "The Distinctiveness of Rylands v Fletcher" (2005) 121 *Law Quarterly Review* 421.

[5] GHL Fridman, "The Rise and Fall of Rylands v Fletcher" (1956) 34 *Canadian Bar Review* 810, 823: "even where injuries to or in connection with the enjoyment of land are concerned, there is something to be said for the idea that the law is paying more attention to the fault underlying the defendant's behaviour and is not deciding cases by the application of strict rules of liability. Even if *Rylands v Fletcher* liability is confined to injuries to land, there is strong support for the proposition that it is akin to liability for negligence. It is certainly accepted that *Rylands* liability is often intermingled with or akin to liability for nuisance. If there inter-relations are accepted, and *Rylands* liability is not so distinct in modern law, but is often very much like other forms of liability which also include or are forms of negligence liability, what can be said of Ames' comment on the 'safe fold' into which Blackburn J guided some previous cases? Whatever may have been said then, it must now be conceded that the barriers between these various kinds of torts are fast vanishing. What need is there, therefore, for a separate rule in *Rylands v Fletcher*?".

context that comprises the bulk of public nuisance cases) has already been subsumed into negligence in Australian law.[6]

This theme, of questioning whether torts previously regarded as being strict in nature should now better be dealt with by fault and negligence, is not unique to this article. On the basis that courts when considering trespass cases now inquire into the circumstances of how the events occurred and engage in balancing between competing interests, torts scholar Beuermann concludes:

> The torts of trespass to the person have evolved to the point that it is no longer possible to isolate a form of liability imposed in respect of those torts which does not involve the courts finely balancing the competing interests of the parties and carefully scrutinising how the defendant engaged in the conduct which interfered with the plaintiff's personal security. The process for determining liability for trespass to the person is therefore not unlike the process for determining liability in the tort of negligence, the principal difference between the two processes being the sophistication of the techniques employed by the courts to balancing those competing interests. To the extent the courts have sought to continually improve the balancing techniques employed in the torts of trespass to the person, it might now be argued that the torts of trespass to the person have bene overtaken by the tort of negligence. As with other forms of outdated technology, the torts of trespass to the person are now best viewed as obsolete. It follows that liability for all interferences with personal security should now be determined in accordance with the tort of negligence.[7]

The exponential growth in the tort of negligence causes scholars to consider and reconsider the boundaries, if any, between it and the "others". The law of nuisance had already been largely formed before a general tort of negligence was recognised. It is not surprising there are serious intellectual questions about the relation between them, and whether one has effectively become otiose given the practical dominance of the other. There is also evidently strong dissatisfaction with the tort of private nuisance as it currently stands.[8] This should make us more open to considering a re-calibration.

## I. Similarities and Differences between the Torts of Negligence and Nuisance

These torts have things in common, and obvious differences. The courts have acknowledged that, often, cases brought under one tort could equally have been brought under the other.[9] Often, these torts are pleaded in the alternative on given facts.[10] The tort of nuisance significantly predated the tort of negligence, being established in the 12th century.[11]

In terms of overlap and similarity, traditionally they were both seen as actions on the case. In both, damage was the gist of the action. Both embrace the concept of "reasonable". Obviously, reasonableness is used in negligence in determining whether or not a duty of care exists and, if so, its scope, as well as questions of breach. In nuisance cases, the court considers the reasonableness or otherwise of the defendant's use of their land.[12] Both consider reasonable foreseeability and remoteness of

[6] *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

[7] Christine Beuermann, "Are the Torts of Trespass to the Person Obsolete? Part 2: Continued Evolution" (2018) 26(1) Tort L Rev 6, 17; Christine Beuermann, "Are the Torts of Trespass to the Person Obsolete? Part I: Historical Development" (2018) 25(3) Tort L Rev 103.

[8] FH Newark, "The Boundaries of Nuisance" (1949) 65 *Law Quarterly Review* 480 lamented its "mongrel origins" and its decline over the years; Allan Beever, *The Law of Private Nuisance* (2013) 5 compared it to a "collapsing building" requiring a "new beginning"; John Murphy, *The Law of Nuisance* (2010) 17 lamented its confused state.

[9] For example *Goldman v Hargrave*, involving the escape of fire from the defendant's land to that of the plaintiff. The Privy Council merely announced the case was being decided on the basis of negligence and nothing else, acknowledging it may also involve nuisance, but finding that question unnecessary to resolve: *Goldman v Hargrave* [1967] 1 AC 645, 657 (Lord Wilberforce, for the Court); *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617, 639: "there are many cases where precisely the same facts will establish liability both in nuisance and negligence" (Lord Reid, for the Court).

[10] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617.

[11] TFT Plunknett, *A Concise History of the Common Law* (1956) 372.

[12] Fridman notes this "seems to indicate that, so far as that tort (nuisance) is concerned, the courts pay some regard to the blameworthiness of the defendant's actions and do not decide the question of nuisance simply on whether the defendant by his

terms of damages.[13] Of course, nuisance was narrower, in being concerned with damage to property interests,[14] while negligence is/was not so confined. Clearly, damages for personal injury are available in negligence; there is conjecture regarding their availability for nuisance.[15] The overlap between the two torts has been the subject of strident scholarly criticism.[16]

There is also great scholarly conjecture about whether liability in nuisance is strict or not.[17] The cases and academic writings are ambivalent, to put it mildly, and the matter has been the subject of strident academic criticism.[18] There are suggestions in case law that liability for nuisance is strict;[19] this also appears in the academic literature.[20] There are also suggestions that some degree at least of fault is necessary to attract liability.[21] Members of the High Court of Australia agreed with the Privy Council's

conduct has interfered with the plaintiff's comfortable enjoyment of his land": GHL Friedman, "The Rise and Fall of Rylands v Fletcher" (1956) 34 *Canadian Bar Review* 810, 822–823.

[13] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617; *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 300 (Lord Goff, for the House).

[14] The plaintiff must show they have some proprietary interest in land: *Hunter v Canary Wharf Ltd* [1997] AC 655.

[15] Dicta of Windeyer J in *Benning v Wong* (1969) 122 CLR 249, 318 suggests its availability; see Martin Davies, "Private Nuisance, Fault and Personal Injuries" (1990) 20 *University of Western Australia Law Review* 129, 130–132.

[16] Murphy, n 8, 17: "the law in this area is so confused that it is impossible to assert with certainty whether these cases are better seen as falling within the scope of private nuisance or the law of negligence"; FH Newark, "The Boundaries of Nuisance" (1949) 65 *Law Quarterly Review* 480, blaming extension of nuisance principles to cases of personal injury, to one-off interferences as well as ongoing interferences, and the *Rylands* decision, for blurring the boundaries between nuisance and negligence; K Barker et al, *The Law of Torts in Australia* (OUP, 5th ed, 2012) calls the relationship between nuisance and negligence "one of the more obscure issues in tort law".

[17] Conor Gearty, "The Place of Private Nuisance in a Modern Law of Torts" (1989) 48(2) *Cambridge Law Journal* 214, 215: "sometimes negligence is essential to (nuisance) liability, sometimes it is quite irrelevant"; Beever, n 8, 9: "it is admitted that it is entirely unclear what standard of liability operates in the law of nuisance. Sometimes the law seems to be strict. Sometimes it appears to be fault-based. And when it is fault-based, the operative notion of fault seems to be some free-floating standard, fluctuating somewhere in the space between strict liability and negligence".

[18] JM Eekelaar, "Nuisance and Strict Liability" (1973) 8 *Irish Jurist* 191, 191: "there can surely be few more fundamental features to civil litigation than knowing whether liability for the act complained of is strict or not. Yet on no other matter do judicial and academic comments on nuisance betray so much confusion"; Murphy, n 8, 54: "perhaps the most confusing question in the whole of the law of private nuisance is whether liability is strict".

[19] Initially a distinction appears to have been drawn between nuisances causing material damage to the land of the plaintiff, liability for which was deemed strict, and nuisance causing (mere) personal discomfort to the plaintiff's use of their land, where investigation into all the circumstances was required: *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642; 11 ER 1483. This distinction was recognised in some State courts: *Harris v Carnegie's Pty Ltd* (1917) 23 ALR 75; *Kraemers v A-G (Tas)* [1966] Tas SR 113 and by Hardie Boys J in *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, 530. Later this distinction may have disappeared. The Court of Appeal found in *Rapier v London Tramways Co* [1893] 2 Ch 588 liability for nuisance was strict: "at common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it" (Lindley LJ, with whom Bowen and Kay LLJ agreed); *Ware v Garston Hauling Co Ltd* [1944] KB 30, 31 (CA); *Farrell v John Mowlem & Co Ltd* [1954] 1 Lloyd's Rep 437, 440: "I think the law still is that any person who actually creates a nuisance is liable for it and for the consequences which flow from it whether he is negligent or not" (Lord Devlin); referred to with apparent approval by the Privy Council in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617, 638 (Lord Reid, for the Court). In *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, Lord Goff (with whom all other Lords agreed) noted that "the law of nuisance historically was a tort of strict liability" (298). At 300, "it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability (for nuisance)" (Lord Goff, with whom all other Lords agreed); *Hunter v Canary Wharf Ltd* [1997] AC 655, 724 (Lord Hope); *Dalton v Henry Angus & Co* (1881) 6 App Cas 740.

[20] Percy Winfield, "Nuisance as a Tort" (1931) 4 *Cambridge Law Journal* 189, 199: "in nuisance it does not in the least follow that the defendant is quit of liability even if he has taken reasonable care"; John McLaren, "Nuisance Law and the Industrial Revolution – Some Lessons from Social History" (1983) 3(2) *Oxford Journal of Legal Studies* 155, 169; Barker et al, n 16, 190: "liability in nuisance is 'strict': it may be established without proof of unreasonable conduct on the defendant's part".

[21] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 897 "the occupier or owner is not an insurer; there must be something more than mere harm done to the neighbour's property to make the party responsible … some degree of personal responsibility is required" (Lord Atkin), 904 "the liability for a nuisance is not, at least in modern law, a strict or absolute liability" (Lord Wright); *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617, 639: "although negligence may not be necessary, fault of some kind is almost always necessary

earlier somewhat equivocal statement that while negligence was not essential in all cases of nuisance, "fault of some kind is almost always necessary".[22] The High Court frankly acknowledged the "wide and uncertain boundaries" of the law of nuisance.[23] Leading textbook writers state Australian law is this area is becoming "less coherent and often inconsistent".[24]

There is perhaps ambiguity in the statement, or claim, that liability in nuisance is "strict". On one view, the strictness of the liability inheres in the fact that the defendant might be liable although they took all reasonable steps to prevent the harm to the plaintiff from occurring.[25] On a second view, the strictness of the liability inheres in the fact that the defendant might be liable although they were not aware, and ought not reasonably to have been aware, of the nuisance,[26] perhaps because the material that caused the nuisance was placed on to the defendant's property at a time prior to the current owner taking possession of the property from which the nuisance emanates. This clearly mimics the kind of language often seen in negligence claims. On a third view, liability in nuisance is even absolute,[27] though the precise meaning of that description was not explained. This third view will not be considered further, due to the dearth of support for it.

While there are some suggestions in the case law to support the strict liability of nuisance to the extent of the second view,[28] it seems that the courts have eventually moved away from this position.[29] Thus, to the extent that strict liability exists at all in the law of nuisance, it could only be in the first sense described. In other words, that the defendant may be liable, although they took all reasonable steps to avoid the nuisance from occurring.

Yet even describing nuisance liability in that sense can be disputed. This is because of the way in which the law of nuisance uses the concept of "reasonable user", in relation to the defendant's activity. If the defendant's use of their land is deemed to be reasonable, they will not be held liable in nuisance.

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(in order to claim in nuisance)" (Lord Reid, for the Court). John Murphy suggests this requirement of "fault" should be limited to foreseeability by the defendant of the risk of harm to the plaintiff (Murphy, n 8, 57).

[22] *Elston v Dore* (1982) 149 CLR 480, 488 (Gibbs CJ, Wilson and Brennan JJ), with whom Murphy J agreed (493). Some say that while some fault is necessary in nuisance it may not amount to negligence (David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 200) but my consideration of the cases suggests very little, if any, practical difference in the application of principles of nuisance and negligence.

[23] *Elston v Dore* (1982) 149 CLR 480, 488.

[24] Harold Luntz et al, *Torts Cases and Commentary* (Lexisnexis Butterworths, 8th ed, 2017) 793.

[25] This view is apparent in *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 300 (Lord Goff, for the House); *Read v J Lyons & Co Ltd* [1947] AC 156, 183 (Viscount Simonds); *Hunter v Canary Wharf Ltd* [1997] AC 655, 724 (Lord Hope); Compare *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409, 414: "he (the defendant) is not responsible for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition" (Vaughan Williams J).

[26] This view is apparent in Eekelaar, n 18, 196 and Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (OUP, 6th ed, 2008) 527: "a defendant who has to have actual or presumed knowledge of the likely consequences of his activity can hardly be said to be liable strictly"; this is disputed by Beever, n 8, 99.

[27] *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, 529 (Shaw LJ) (suggesting that the English common law liability in nuisance was "absolute" in character).

[28] *Tarry v Ashton* (1876) 1 QBD 314, 320 (Lush and Quain JJ); *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 919: "it is clear that an occupier may be liable though he (1) is wholly blameless; (2) is not only ignorant of the existence of the nuisance but also without means of detecting it, and (3) entered into occupation after the nuisance had come into existence" (Lord Porter).

[29] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 897 (Lord Atkin), 904 (Lord Wright); *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] QB 836, 856 (CA) (Stuart-Smith LJ, with whom Mackinnon and Goddard LLJ agreed). In *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637, 659 Dixon J, in considering a claim of nuisance against a property owner for something present on the property before their occupation, determined whether the owner or their agents knew or ought to have known of the defect or danger, and/or had reasonable opportunity to prevent it. He said in such a case, to make a defendant liable, "some fault on his (sic) part is necessary" (659); in *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 299 Lord Goff for the House said liability in nuisance was strict "at least in the case of defendant who has been responsible for the creation of a nuisance", suggesting that he may not regard as strict the liability in the case of a defendant who did not create the nuisance but "inherited it" when purchasing the relevant property.

If their use of land is not deemed to be reasonable, they can be held liable in nuisance, even if they took reasonable care and skill to avoid it.[30] Clearly, the law of negligence also embraces the concept of "reasonableness", in terms of establishing that a duty of care exists, and determining questions such as foreseeability of damage. To that extent, there is overlap between negligence and nuisance. However, the fact that a person can be held liable in nuisance even if they took reasonable care and skill to avoid it can suggest a meaningful difference in liability between the two torts, even if the meaning of "reasonable" in the context of nuisance is unclear.[31]

There are also some conceptual difficulties involved in maintaining both that nuisance is a tort of strict liability, but also accepting, as the courts have,[32] that damage must be foreseeable in order to attract liability. Foreseeability is typically associated with blame.[33]

That being acknowledged, the differences can arguably be less significant in actual practice.[34] This is because courts are aware that if they find the use of the defendant's land, including their response to a known danger, "reasonable", no action for nuisance can succeed.[35] Factors used in determining whether the defendant's use of their land was reasonable in the circumstances, or whether they responded reasonably to a known danger, relate closely to negligence claims.[36] Lord Goff for the House of Lords referred to this "reasonableness" principle in the tort of nuisance as the way in which notions of strict liability are "kept under control".[37] Peter Cane refers to the "centrality to the tort of nuisance of the fault-based concept of unreasonableness".[38]

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[30] *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 299 (Lord Goff, for the Court); Murphy, n 4, 655: "a reasonable user of land is not to be confused with reasonable care. The former concept relates to a question of give and take between neighbours, while the latter relates to the question of care demanded by a given risk"; Winfield, n 20, 199.

[31] Beever, n 8, 11: "commentators are quick to stress that 'reasonableness' does not mean what it means in the law of negligence. What does it mean then? We are not told. This is no mere oversight. It is the result of the fact that the law (of nuisance) operates in accordance with no specific understanding of reasonableness whatsoever"; Barker et al, n 16, suggest some difference in that negligence considers whether the defendant's past conduct was unreasonable, while nuisance focuses on whether the defendant's past and current conduct, and particularly the effect of it on the plaintiff, is unreasonable (216).

[32] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617, 639 (Lord Reid, for the Council).

[33] Allan Beever states that current nuisance law is incoherent, apparently remaining a strict liability tort but also requiring foreseeability: "if the point of insisting on foreseeability is not to ensure that a non-negligent defendant cannot be liable, then what is the point?": Beever, n 8, 105. Gerry Cross, "Does Only the Careless Polluter Pay?" (1995) 111 *Law Quarterly Review* 445, 473: "in *Cambridge Water* Lord Goff stated 'if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid (harm to his neighbour's enjoyment of his land)' … it is impossible for nuisance to meet this description if the damage or injury is required to be the reasonably foreseeable result of the operation or activity, because in the great majority of cases the steps the defendant will be required to take to render the consequences no longer reasonably foreseeable will be no more onerous than those she would be required to take under the negligence duty to take care"; Compare Nolan, n 4, 444: "there can be foreseeability without fault".

[34] Paula Giliker, "Nuisance" in Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts* (Lawbook, 10th ed, 2011) 506: "evidence that the defendant has taken all possible precaution to avoid harm is not immaterial, because it has a bearing on whether he subjected the plaintiff to an unreasonable interference".

[35] *Kennaway v Thompson* [1981] QB 88, 94 (Lawton LJ, for the Court)(CA); *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 299 (Lord Goff, for the House).

[36] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 903 (Lord Wright, stating that in determining a nuisance claim, and the balance between the rights of the plaintiff and those of the defendant, it should be determined what was "reasonable according to the ordinary uses of mankind"; Lord Porter concluded the defendants were liable in nuisance because they "could have prevented the danger if they had acted reasonably" (920). An earlier example is *Hole v Barlow* (1858) 4 CB NS 334; 140 ER 1113 where Willes J in determining a nuisance case took into account whether the challenged conduct had occurred in a "reasonable and proper manner" and in a "reasonable and proper place"; this was later rejected in *Bamford v Turnley* (1862) 3 B & S 66; 122 ER 25; and Branson J in *Ilford Urban DC v Beal* [1925] 1 KB 671, 679 where the defendants was not liable in nuisance because they "did not discover, and could not by the exercise of any diligence in the circumstances reasonably have discovered, the existence of the sewer, and thus the existence and extent of (their) duty to the plaintiffs".

[37] *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264, 299 (Lord Goff, for the House).

[38] Peter Cane, "What a Nuisance!" (1997) 113 *Law Quarterly Review* 515, 520.

Thus, there is in fact a very strong overlap between nuisance and negligence considerations. Another example appears in the Court of Appeal's *Leakey v National Trust*. There Megaw J states:

> The plaintiff's claim is expressed in the pleadings to be founded on nuisance. There is no express reference to negligence in the statement of claim. But there is an allegation of a breach of duty, and the duty asserted is, in effect, a duty to take reasonable care to prevent part of the defendant's land from falling on to the plaintiff's property. I should for myself regard that as being properly described as a claim in nuisance.[39]

Thus, in a case said to be about nuisance, which the court says is properly described as a claim in nuisance, the Court of Appeal, adopting the view of the Privy Council in *Goldman v Hargrave*, proceeds to consider whether the "defendant's duty to do that which is reasonable for him to do"[40] is met, including factors that would typically be taken into account in a negligence action in such circumstances.[41] Again in *Sedleigh-Denfield*, members of the Court consider the reasonableness of the defendant's actions (typically associated with negligence) in failing to end a nuisance,[42] in a case ostensibly brought in *nuisance*, and in some cases at the same time as the judges deny that negligence is necessary or relevant in nuisance.[43]

Lord Wilberforce for the Privy Council in *Goldman v Hargrave*[44] said that negligence would often be relevant in nuisance cases. Murphy says it is "highly relevant".[45] Lord Reid said in *The Wagon Mound* (*No 2*) that fault of some kind was almost always necessary in a nuisance claim.[46] The textbook writers take a similar position. Davies points out that courts will, in considering nuisance cases, consider whether the defendant has taken precautions against interference with the property of others,[47] in a way analogous to a fault-based inquiry. Sappideen, Vines and Watson express a similar view.[48] Luntz et al say fault is

[39] *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, 514 (with whom Shaw and Cumming-Bruce LLJ agreed). In a separate judgment, Shaw LJ acknowledged the anomaly. Referring to the Privy Council decision in *Goldman v Hargrave* [1967] 1 AC 645, he noted it had: "expressed powerful support for a development in the law relating to the liability of a landowner for nuisance. It is to be observed that the judgment was expressly stated to be founded on negligence" (529). He acknowledged the need to hem in a principle of strict liability (nuisance, at least classically) within narrow boundaries, but lamented that he did not "see how the difficulty is disposed of by transmuting a liability in nuisance (howsoever occasioned) into a duty to do what can reasonably be done in the circumstances of a particular case to prevent or to diminish the consequences of a nuisance" (529). Nolan describes the case and other of its ilk as instances of negligence liability "dressed up in nuisance clothing": Nolan, n 4, 438.

[40] *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, 526.

[41] These were stated to be what a reasonable person in the defendant's position would have done, whether the danger might have readily been overcome, the likelihood that injury would eventuate, whether the defendant had sufficient time on becoming aware of the danger to act, the means of the defendant, the means by which the plaintiff might have protected themselves from the damage caused (524–526). Allan Beever says that the *Goldman* decision "aligns … element(s) of the law of nuisance with the law of negligence": Beever, n 8, 73.

[42] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 894–895 (Viscount Maugham), 903–904 (Lord Wright), 913 (Lord Romer), 919–920 (Lord Porter). John Murphy, n 8, notes of the judgment of Viscount Maugham in *Sedleigh-Denfield*, but in terms equally appropriate to the other judgments just cited, "Viscount Maugham … (held) the defendants liable, finding that the defendants 'with knowledge or presumed knowledge of … (the danger posed by the inadequate pipe) failed to take any reasonable means to bring it to an end'. The language is clearly redolent of negligence".

[43] Lord Atkin said that a nuisance action did not necessarily require a deliberate act or negligence (897); Lord Wright said negligence was not a necessary condition for nuisance (904). Lord Porter said a defendant could be liable for nuisance although they were blameless (919).

[44] *Goldman v Hargrave* [1966] 1 AC 645, 657.

[45] Murphy, n 8, 45.

[46] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617, 639.

[47] Davies, n 15, 134–135: "in cases of nuisance by interference with the plaintiff's use and enjoyment of property, the court considers all of the circumstances in determining whether the interference is unreasonable. If the defendant has taken precautions against interference, that is one circumstance to take into account along with all the others."

[48] Carolyn Sappideen, Prue Vines and Penelope Watson, *Torts Commentary and Materials* (Law Book, 12th ed, 2016) 782 explaining that traditionally, in cases of misfeasance, nuisance was a strict liability tort, whereas in cases of nonfeasance, proof of fault was required. They conclude that in fact "in almost all cases, proof of fault is required. This may be because of the influence of negligence on nuisance".

relevant in nuisance claims, at least those involving a one-off nuisance, and in cases where a defendant is sought to be made liable for adopting or continuing a nuisance.[49]

This is important. One reason the High Court in *Burnie Port Authority* gave for its absorption of the strict liability *Rylands* into the law of negligence was that, in application, *Rylands* was not really strict, but involved consideration of all of the circumstances,[50] in a way that mimicked the fault tort of negligence. This had occurred indirectly and on a piecemeal basis through development in the interpretation of the concept of "non-natural use":

> In determining whether a use satisfies the "non-natural", "special" or "not ordinary" description, regard may be had to the manner as well as to the nature of the use. Increasingly, *Rylands v Fletcher* liability has come to depend on all the circumstances surrounding the introduction, production, retention or accumulation of the relevant substance. That being so, the presence of reasonable care or the absence of negligence in the manner of dealing with a substance or carrying out an activity may intrude as a relevant factor in determining whether that use of land is a "special" and "not ordinary" one.[51]

There is an analogy with the law of nuisance. Just like *Rylands*, the tort of nuisance began life as a principle of strict liability. However, it was over time realised that this was too simplistic. A more sophisticated approach was required, taking into account specific circumstances of the particular case, including reasonableness. It became clear that more than a mere interference with the property rights of another was (or should be) required; it was necessary to balance competing interests, and to consider the question of the reasonableness of the defendant's conduct in the circumstances. Principles of strict liability are not well equipped to do that. Fault principles are. Similar reasoning used by the High Court in *Burnie Port Authority* to justify the subsumption of supposedly strict-liability *Rylands* into fault-based negligence also justify the subsumption of supposedly strict-liability nuisance into fault-based negligence. Further, as learned scholars have noted, existing private nuisance principles are confused and inconsistent. It would assist clarity in the law by simply applying ordinary negligence principles instead.

Finally, if the law were to continue to insist that liability in nuisance is "strict" in some way, it would be necessary to explain and justify why it is that the law makes it easier to claim for an interference with property interests than it would for personal injury.[52] Why should liability for interference with property interests be governed by strict liability, but liability for personal injury not?

Sometimes, it is suggested that the "strictness" should be reserved for only some categories of case of private nuisance, for instance interference with enjoyment, as opposed to physical damage to property.[53] Respectfully, this simply moves the goalposts, but would not solve the problem. Why should it be easier for a plaintiff to sue for interference with enjoyment of land, rather than damage to the land itself? The law's historical reification of property rights over other rights is understood. However, it has become very difficult to justify today, and we should not indirectly perpetuate it through the law of nuisance.

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[49] Luntz et al, n 24, 793–794.

[50] *Hazelwood v Webber* (1934) 52 CLR 268, 278: "in applying the doctrine (*Rylands*) to the use of fire in the course of agriculture, the benefit obtained by the farmer who succeeds in using it with safety to himself and the frequency of its use by other farmers are not the only considerations. The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it, are even more important factors. These depend on climate, the character of the country and the natural conditions … the experiences, conceptions and standards of the community enter into the question of what is a natural or special use of land and of what acts should be considered so fraught with risk to others as not to be reasonably incident to the proper enjoyment" (Gavan Duffy CJ, Rich Dixon and McTiernan JJ); to like effect Starke J (281); *Read v J Lyons & Co Ltd* [1947] AC 156, 176 (Lord Porter).

[51] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 539 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ). Due to space restrictions, I will not discuss separately the subsumption of liability for public nuisance on the highway within negligence, because the justices of the High Court in the case in which this occurred explained that they were doing so "by parity with the reasoning" in *Burnie*: *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 570 (Gaudron, McHugh and Gummow JJ), with whom Kirby J agreed (604).

[52] Cane, n 38, 520.

[53] Gearty, n 17, 242; Giliker, n 34, 499; Compare Maria Lee, "What Is Private Nuisance?" (2003) 119 *Law Quarterly Review* 298, 324: "there is no reason why strict liability should be attracted solely by land use rather than, for example, transport of dangerous materials".

## II. Would the Result in Nuisance Cases Differ if the Case Were Decided Based on Negligence?

It seems logical in testing this proposition to consider some of the leading nuisance cases, to see whether the outcome would likely have been different if the tort of negligence had been utilised. Again, this was one of the arguments made by the High Court in subsuming *Rylands* into the law of negligence, that it would lead to the same result,[54] at least in the vast majority of cases.

The case of *Sedleigh-Denfield*[55] was a case of private nuisance involving the escape of water from the defendant's land onto that of the plaintiff. The escape occurred after heavy rain. It occurred because a third party had placed a grid in a particular position on a drainpipe. The defendant was not responsible for that work, but was aware it had occurred. The defendant was also aware the drainpipe tended to become clogged, because they cleaned it out twice a year. The Court found the defendant liable in private nuisance.

This is concededly conjecture, but it is considered likely from a reading of the judges' comments that the Court would have reached the same decision on negligence principles. Viscount Maugham noted the defendant had "neglected to take the very simple step of placing the grid in a proper place which would have removed the danger",[56] suggestive of a finding of fault and/or negligence. Lord Atkin noted the defendant might reasonably have expected obstruction in the pipe, and flooding of the plaintiff's land might result. This of course goes to reasonable foreseeability, a concept he famously articulated in a negligence decision a decade earlier.[57] Lord Wright noted the current case had an "affinity" with a claim for negligence.[58] Lord Romer found against the defendant (in nuisance) for "failing to take any reasonable means to bring it to an end".[59] Lord Porter agreed, concluding the defendant should "as reasonable persons" to have recognised the danger.[60]

The result in *Cambridge Water Co v Eastern Counties Plc* would also have been the same.[61] The claim was rejected on the basis the loss to the plaintiff was not reasonably foreseeable. Clearly, that finding was fatal to a finding of negligence, just as the Court found it was fatal to a claim of private nuisance and/or *Rylands*. On the facts in *Hargrave v Goldman*,[62] involving the spread of a fire from the land of the defendant to the land of the plaintiff, members of the High Court commented that "it is of no consequence"[63] whether the claim was brought in nuisance or negligence. The other judge in the case, Windeyer J, said the distinction between negligence and nuisance was "not altogether clear cut", and that many actions that today would be recognised as negligence cases were in the past seen as cases of nuisance.[64]

The cases where errant golf balls have constituted a nuisance[65] do not present real difficulties if nuisance were to be integrated into the law of negligence. My understanding of them is that they could easily have been decided based on the failure of the owner of the golf course to take sufficient steps to avoid

[54] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 547 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

[55] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880.

[56] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 895.

[57] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 896.

[58] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 904.

[59] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 913.

[60] *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880, 920.

[61] *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264.

[62] *Hargrave v Goldman* (1963) 110 CLR 40.

[63] *Hargrave v Goldman* (1963) 110 CLR 40, 53 (Taylor and Owen JJ).

[64] *Hargrave v Goldman* (1963) 110 CLR 40, 62.

[65] For example, *Lester-Travers v City of Frankston* [1970] VR 2; *Campbelltown Golf Club Ltd v Winton* [1998] NSWSC 257; *Challen v McLeod Country Golf Club* [2004] Aust Torts Reports 81-760.

the escape of golf balls onto neighbouring premises. The classic decision of *Bolton v Stone*[66] does not present difficulties. The facts there were quite different, involving an extremely rare event,[67] compared with the regular occurrences of escaping balls that were a feature of the nuisance cases. Thus, the fact the plaintiff in *Bolton v Stone* did not succeed in negligence (or nuisance) does not preclude a finding that a plaintiff who is constantly bombarded with errant golf balls could recover in negligence against the club.

The Courts have referred to the "close relation between nuisance and negligence".[68] In *Delaware Mansions Ltd v Westminster City Council*,[69] Lord Cooke, with whom all other Lords agreed, discussed the decisions in the *Wagon Mound* (*No 2*) and *Goldman v Hargrave*. He said both concerned what a reasonable person in the shoes of the defendant would have done, and:

> the label nuisance of negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it.[70]

While it is agreed the labels should be removed, it is respectfully suggested that some difference might occur in cases where it might be said the plaintiff has been guilty of some contributory negligence. This may be a part defence in negligence claims. Traditionally it is not a defence in relation to nuisance.[71] Further, a traditional remedy in nuisance claims is that of an injunction. This is typically not available in relation to negligence.[72] It is possible this could be reformed. Further, there are some restrictions on who has title to sue in nuisance actions[73] that would be removed if the action were reconceptualised as one in negligence. It is conceded that there is the odd case where nuisance has been found, in circumstances where negligence was not.[74]

## Conclusion

Part 1 of this article demonstrated the gradual shift in the realm of civil obligations from a position of strict liability, to discourage the blood feud, in favour of a fault-based system. The precise starting point of this trend is open to conjecture, since it is suggested that juries were informally taking into account fault and other factors long before the formal legal rules caught up. But catch up they did, even if this has been somewhat piecemeal and messy. The lesson is that the law requires flexibility in application, for it to consider the particular circumstances of a case in determining just outcomes. Across criminal and civil law, the law eventually found that fault-based doctrines were better equipped to do that, rather than simplistic one-size-fits-all rules apparently imposing fixed results, such as principles of strict liability. We should heed that lesson. Having said that, strict liability did not entirely fall out of the common law, despite the exponential growth of fault-based negligence, and pockets of it persist. This article has found that the arguments for retaining strict liability in our system are weak and unprincipled.

Given that the United Kingdom court subsumed a leading strict liability case into the law of private nuisance, and the Australian court subsumed that strict liability case into the law of negligence, this article considered whether the next step should be for the Australian courts to subsume the tort of private nuisance into the law of negligence. There is substantial existing overlap between them, and

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[66] *Bolton v Stone* [1951] AC 850.

[67] *Lester-Travers v City of Frankston* [1970] VR 2, 11.

[68] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617, 637 (Lord Reed, for the Court).

[69] *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321; [2001] UKHL 55.

[70] *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321, 333; [2001] UKHL 55.

[71] *Campbelltown Golf Club Ltd v Winton* [1998] NSWSC 257 (Court of Appeal).

[72] *Miller v Jackson* [1977] QB 966, 980 (Denning MR, dissenting in the result).

[73] *Hunter v Canary Wharf Ltd* [1997] AC 655.

[74] *Fennell v Robson Excavations Pty Ltd* [1977] 2 NSWLR 486; John Murphy, n 8, 56 discusses two decisions where a defendant was found to be liable in nuisance, although their conduct was not objectively unreasonable (thus, they would not be liable on the basis of negligence). It is possible that if a separate nuisance action were not available, the court may have taken a different view as to whether the defendant was negligent. Alternatively, the result in the case may be different, if the law is reformed as suggested.

the boundaries between the two are far from clear. It is hard to find a case where the action of private nuisance would lay, while a negligence action would not. All these centuries on, it remains unclear whether the tort of private nuisance is fault-based or not, and the extent of actual difference where fault is used in the two torts, when reasonableness is apparently being used as a control mechanism in both. In conclusion, if private nuisance is seen as a strict liability tort, strict liability should no longer be applied in the law for the reasons given in Part 1. If it is seen as (effectively) a fault-based tort, it should be subsumed within the dominant fault-based tort of negligence for the reasons discussed in Part 2. The law would be simplified and made clearer as a result. The law must be prepared to squarely reconsider legal doctrine that has de facto, if not yet de jure, been overridden and sidelined by broader principles. The High Court showed the way in *Burnie Port Authority*.[75]

[75] The ideas in this two-part article will be expanded upon in the forthcoming book Anthony Gray, *The Evolution from Strict Liability to Fault in the Law of Torts* (Hart Publishing, 2021).